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In The

Supreme Court of the United States

October Term, 1971

No. 1819

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

vs.

NORTHWEST AIRLINES, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Respondent, Northwest Airlines, Inc., submits this Brief in opposition to the petition of Air Line Pilots Association, International, for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on April 15, 1971. In accordance with Rule 40, subd. 3, of this Court, we accept the petitioner's recital of the lower court opinions*, invocation of the jurisdiction of this Court under 28 U.S.C. § 1254(1), and citation of relevant statutory provisions. However, we believe that petitioner's formulation of the question presented requires revision, and that its statement of the case is deficient in certain respects.

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*The District Court's Opinion dated December 22, 1970, now is officially reported at 325 F. Supp. 994.

QUESTION PRESENTED

Whether a federal court has jurisdiction to issue an injunction to preserve the status quo pending resolution by an Airline System Board of Adjustment of a dispute over the meaning and application of a collective bargaining agreement between an air carrier and a union representing certain of the carrier's employees.

STATEMENT OF CASE

This is a suit to enjoin petitioner Air Line Pilots Association, International [hereinafter "ALPA"] from engaging in a concerted refusal to cross the picket lines of a sister union engaged in a strike against respondent Northwest Airlines, Inc. [hereinafter "NWA"], pending resolution by the NWA-ALPA System Board of Adjustment of the question of ALPA's right to do so under an existing collective bargaining agreement. The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331 and 1337.

NWA, a Minnesota corporation, is an air carrier engaged in domestic and international operations. ALPA has been and is now the duly designated collective bargaining representative of the airline pilots employed by NWA. Effective July 1, 1969, after a one-day strike, NWA and ALPA entered into a collective bargaining agreement covering rates of pay, rules and working conditions for NWA employees represented by ALPA [hereinafter "the AGREEMENT"]. This AGREEMENT was in full force and effect at the time of the events at issue in this proceeding, though it subsequently has become "open" for negotiation. In the interim and during all material times, pursuant to the specific terms and underlying policies of the Railway Labor Act [45 U.S.C. § 151 *et seq.*], which are expressly designed to preclude work stoppages, NWA and ALPA have established detailed ad-

ministrative machinery for the disposition of all "minor disputes" which may arise during the life of the AGREEMENT concerning interpretation and application thereof.[1]

On July 8, 1970, at approximately 1:00 a.m., certain of NWA's clerical, office, fleet and passenger service employees represented by the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees [hereinafter "BRAC"] commenced a strike against NWA in a "major dispute" over the terms of a collective bargaining agreement. As a part of that strike action, BRAC pickets and banners were present at NWA's facilities in Minnesota and elsewhere throughout the strike. Nevertheless, NWA continued in partial and increasing operation during the BRAC strike and the pilots represented by ALPA continued, until the action which precipitated this proceeding, to bid and fly available schedules on NWA's system according to NWA's posting of schedules under the AGREEMENT [Section 11].

On October 8, 1970, Charles H. Ruby, President of ALPA, sent a telegram to NWA advising that commencing at 5:01 a.m., Central Daylight Time, October 13, 1970, all NWA pilots represented by ALPA would refuse to cross the BRAC picket lines. Upon receipt of this telegram, NWA invoked the jurisdiction of the NWA-ALPA System Board of Adjustment by a Submission. NWA also sent a telegram to the National Mediation Board requesting it to advise NWA of the availability of its services and requesting an interpretation of a Mediation Agreement entered into by NWA and ALPA on June 13, 1969. Thereafter, on October 10, 1970, NWA commenced this action in the above Court seeking in-

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[1]Section 32 of the AGREEMENT and the separate agreement establishing a System Board of Adjustment [hereinafter "the System Board Agreement"].

junctive relief requiring ALPA to cancel its notice of refusal to cross BRAC picket lines, pending resolution of the dispute by the System Board and/or the National Mediation Board.

On October 12, 1970, counsel for both parties appeared before the District Court to advise that a truce had been reached whereby ALPA would cancel its aforementioned notice and NWA would withhold all further action before that court, the System Board of Adjustment and the National Mediation Board. This agreement was confirmed by telegram from Charles H. Ruby dated October 12, 1970. NWA complied with the terms of this telegram, and the pilots thereupon continued to bid and fly their posted schedules.

On November 24, 1970, Ruby broke the truce and sent another telegram to NWA again advising that commencing at 5:01 a.m., Central Standard Time, November 27, 1970, all NWA pilots represented by ALPA would refuse to cross the BRAC picket lines. Upon receipt of this telegram, NWA again invoked the jurisdiction of the System Board of Adjustment by a Submission, and it also again sent a telegram to the National Mediation Board requesting the Board to advise NWA of the availability of its services and requesting an interpretation of the aforementioned Mediation Agreement. Thereafter, NWA reactivated its request for injunctive relief from the District Court by a Supplemental Complaint, and counsel for both parties appeared before that court on November 25, 1970 on NWA's application for a temporary restraining order.

On November 26, 1970, the District Court issued a temporary restraining order requiring ALPA to withdraw its action scheduled for November 27, 1970, and the court set December 2, 1970 for hearing on NWA's motion for a preliminary injunction. Following that hearing, the District Court

denied NWA's motion and dissolved the temporary restraining order, effective December 4, 1970 at 5:01 a.m., Central Standard Time. The remainder of the procedural history involved in this litigation has been set forth in petitioner's Statement of the Case [pp. 8-9] and will not be repeated here.

ARGUMENT

INTRODUCTION

Under Rule 19 of this Court, review on a writ of certiorari will be granted only where there are "special and important reasons" therefor. The strict standard which a petitioner for a writ of certiorari must meet has been articulated many times by this Court. It is clear that petitioner here has not met its burden of demonstrating the presence of such reasons. The decision of the Eighth Circuit Court of Appeals in this case is not only consistent with principles established in decisions of this Court, but in fact is required by those decisions. Furthermore, the Eighth Circuit's decision in no way conflicts with that of the Fifth Circuit in *Brotherhood of Locomotive Firemen and Enginemen v. Florida East Coast Ry.*, 346 F.2d 673 (5th Cir. 1965). Finally, the Eighth Circuit's decision is not only consistent with the statutory collective bargaining structure, but in fact is required to protect the integrity of the statutory and contractual provisions for the resolution of disputes such as that in this case. For these reasons, respondent urges that the petition for a writ of certiorari should be denied.

I. THE COURT OF APPEALS' DECISION IS NOT ONLY CONSISTENT WITH PRINCIPLES ESTABLISHED IN DECISIONS OF THIS COURT, BUT IN FACT IS REQUIRED BY THOSE DECISIONS.

Petitioner contends that the decision of the Eighth Circuit Court of Appeals conflicts with principles established by this Court in dealing with questions arising under the Railway Labor Act and the Norris-LaGuardia Act. It is not surprising that petitioner is unable to cite any relevant authority for this proposition, since this Court's decisions over the past three decades, culminating with that in *Chicago & Northwestern Ry. v. United Transp. Union*, 39 U.S.L.W. 4641 (U.S. June 1, 1971), establish without question that in order to protect the integrity of the statutory framework established by the Railway Labor Act, federal courts are empowered to grant injunctive relief under that Act notwithstanding the provisions of Norris-LaGuardia.

To be sure, Norris-LaGuardia, 29 U.S.C. § 101, et seq. [the so-called "anti-injunction" statute], circumscribes the power of a federal court to grant injunctions in the context of some labor disputes. Thus when carriers [or their employees or representatives] sought injunctive relief from the federal courts in order to preserve the status quo while the procedures outlined by the Railway Labor Act were pursued, it was inevitable that a clash would occur between the underlying policy of the Norris-LaGuardia Act [to limit the "intermeddling" of federal courts in labor disputes] and the underlying policy of the Railway Labor Act [to provide for the orderly adjustment of disputes in the railroad and airline industry so as not to interrupt the flow of commerce].

In one of the leading cases involving this "clash," *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30 (1957), the railroad submitted several "minor

disputes"[2] arising under the collective bargaining agreement to the National Railroad Adjustment Board after negotiations over them had been unproductive. In response, the union issued a strike call, and the railroad sought and obtained injunctive relief from the federal district court. In holding that injunctive relief was appropriate, this Court discussed the apparent conflict between the Norris-LaGuardia Act and the Railway Labor Act:

> The only question which remains in whether the federal courts can compel compliance with the provisions of the Act to the extent of enjoining a union from striking to defeat the jurisdiction of the Adjustment Board. The Brotherhood contends that the Norris-LaGuardia Act has withdrawn the power of federal courts to issue injunctions in labor disputes. That limitation, it is urged, applies with full force to all railway labor disputes as well as labor controversies in other industries.
>
> We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable.
>
> In adopting the Railway Labor Act, Congress endeavored to bring about stable relationships between

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[2]This Court has, itself, devised the terms "minor disputes" for disagreements concerning the interpretation of an existing contract, and "major disputes" which arise when a new contract is sought. Pursuant to 45 U.S.C. § 152 First, Second and Sixth, air carriers are obligated to establish an internal grievance procedure for the processing of "minor disputes"; and if that internal procedure does not resolve the dispute, then the matter may be submitted to an Airline System Board of Adjustment, which *must* be created pursuant to the mandate of 45 U.S.C. § 184. The parties to a "minor dispute" then are bound by the results of this administrative adjudicatory process established by the Act. In the instant case, NWA and ALPA have complied with the mandate of 45 U.S.C. § 152 First, Second and Sixth by establishing a grievance procedure in Section 32 of the AGREEMENT; they also have complied with the mandate of 45 U.S.C. § 184 by establishing a System Board of Adjustment under the separate System Board Agreement.

labor and management in this most important national industry. It found from the experience between 1926 and 1934 that the failure of voluntary machinery to resolve a large number of minor disputes called for a strengthening of the Act to provide an effective agency, in which both sides participated, for the final adjustment of such controversies. Accumulation of these disputes had resulted in the aggregate being serious enough to threaten disruption of transportation. Hence, with the full consent of the brotherhoods, the 1934 amendment became law.

The Norris-LaGuardia Act, on the other hand, was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining. The Act aimed to correct existing abuses of the injunctive remedy in labor disputes. Federal courts had been drawn into the field under the guise either of enforcing federal statutes, principally the Sherman Act, or through diversity of citizenship jurisdiction. In the latter cases, the courts employed principles of federal law frequently at variance with the concepts of labor law in the States where they sat.

Congress acted to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital. Rep. LaGuardia, during the floor debates on the 1932 Act, recognized that the machinery of the Railway Labor Act channeled these economic forces, in matters dealing with railway labor, into special processes intended to compromise them. Such controversies, therefore, are not the same as those in which the injunction strips labor of its primary weapon without substituting any reasonable alternative.

In prior cases involving railway labor disputes, this Court has authorized the use of injunctive relief to vindicate the processes of the Railway Labor Act. *Virginian R. Co. v. System Federation No. 40*, 300 U.S. 515, was an action by the union to enjoin compliance with the Act's provisions for certification of a bargaining representative. The question raised was whether a federal

court could issue an injunction in a labor dispute. The Court held:

> "It suffices to say that the Norris-LaGuardia Act can affect the present decree only so far as its provisions are found not to conflict with those of § 2, Ninth, of the Railway Labor Act, authorizing the relief which has been granted. Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act." *Id.* at 563.

In *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, and other similar cases, the Court held that the specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-LaGuardia Act.

> "Our conclusion is that the District Court has jurisdiction and power to issue necessary injunctive orders [to enforce compliance with the requirements of the Railway Labor Act] notwithstanding the provisions of the Norris-LaGuardia Act." *Id.* at 774.

This is a clear situation for the application of that principle.

Id. at 39-42.[3]

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[3]It is upon the principal authority of this case that the Eighth Circuit Court of Appeals in the so-called Boiler Operators Case, *International Ass'n of Machinists v. Northwest Airlines, Inc.*, 304 F.2d 206 (8th Cir. 1962), held that a federal court may enjoin strike activities on the part of a union in order to protect the processing of a "minor dispute" in the manner established by the Railway Labor Act and the collective bargaining agreement entered into pursuant thereto. Also, in an earlier case arising out of a separate dispute, *Northwest Airlines, Inc. v. International Ass'n of Machinists*, 178 F. Supp. 825 (D. Minn. 1959), Judge Devitt issued a preliminary injunction against the union's strike activities since it had not complied with the statutory and contractual processes in connection with a "minor dispute". In doing so, even in the absence of an express no-strike clause in the contract, Judge Devitt characterized the union's conduct as "a deliberate and intentional interference with plaintiff's operations contrary to the spirit and purpose of the Railway Labor Act." Id. at 827.

This Court also has held, prior to the *Chicago River* case, that a party to a "major dispute"[4] may be restrained from using self-help unless and until the established procedures for resolution of such disputes have been exhausted. *Brotherhood of R.R. Trainmen v. Toledo, Peoria & Western R.R.*, 321 U.S. 50 (1944). *See also, Elgin, Joliet & Eastern R.R. v. Burley*, 325 U.S. 711 (1944) [recognizes that the parties to a "major dispute" are not entitled to employ self-help prior to exhaustion of the statutory procedures].

Clearly, then, this Court's decisions establish that parties to either a "major dispute" or a "minor dispute" are obligated to utilize the statutory procedures outlined by the Railway Labor Act. In the last three years, this Court has further extended its rulings to provide even greater protection for processing labor disputes in accordance with statutory and contractual requirements. Thus, in the *Detroit and Toledo Shoreline R.R. v. United Transp. Union*, 396 U.S. 142 (1969), this Court held that the "status quo" to be preserved pending processing of the dispute included not only the precise terms of the collective bargaining agreement, but also included the "actual, objective working conditions" out of which the dispute arose.

Moreover, the concern of this Court that parties to collective bargaining agreements abide by the provisions of those agreements, and the statutes applicable thereto, has been manifested further in a context not involving the Railway Labor Act. In *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), this Court held that the Norris-LaGuardia Act does not bar granting injunctive relief to an

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[4]Unlike the parties to a "minor dispute," who are bound by the results of the mandatory adjudicatory process established by the Railway Labor Act, the parties to a "major dispute" are free to exercise self-help after exhausting the mediatory process established by the Act for such disputes.

employer against a strike in breach of a no-strike clause in a collective bargaining agreement, thus making the no-strike clause specifically enforceable under Section 301(a) of the Labor Management Relations Act. This decision overturned a line of decisions which had held that the federal court injunctive power was not available to enforce the grievance and arbitration procedures established by parties governed by the Labor Management Relations Act.[5]

Most recently, this Court's continuing awareness of the need for preserving the integrity of the statutory and contractual procedures to promote stability between labor and management, most particularly in the area of national transportation, now has culminated in its decision in *Chicago & Northwestern Ry. v. United Transp. Union*, 39 U.S.L.W. 4611 (U.S. June 1, 1971). There the parties had negotiated to impasse over the terms of a new agreement, and admittedly all of the statutory procedures for the resolution of the major dispute have been exhausted. When the union then threatened to strike, the railroad sought injunctive relief against the strike on the ground that the union had failed to perform its obligations under 45 U.S.C. § 152 First "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions."[6]

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[5]This Court also has held, as approved in *Boys Markets*, that an implied no-strike clause arises as the quid pro quo to an agreement to submit interpretation disputes to arbitration. *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95 (1962), discussed in more detail at pp. 16-17, *infra*.

[6]This section provides in full as follows: "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

In response, the union contended, as does ALPA here, that the Norris-LaGuardia Act deprived the federal district court of jurisdiction to issue such an injunction.

In delivering the opinion of the Court, Mr. Justice Harlan framed the issues as follows:

> "The narrow questions presented to us are whether § 2 First imposes a legal obligation on carriers and employees or is a mere exhortation; whether the obligation is enforceable by the judiciary; and whether the Norris-LaGuardia Act strips the federal courts of jurisdiction to enforce the obligation by a strike injunction."

39 U.S.L.W. at 4642. Citing several of the Court's prior opinions, as well as the legislative history of the Railway Labor Act, Mr. Justice Harlan then articulated the Court's rulings on these issues:

> 1. Section 2 First [45 U.S.C. § 152 First] of the Railway Labor Act is more than a mere statement of policy; rather, it imposes a legal obligation.
>
> 2. This legal obligation is enforceable by "appropriate judicial means."
>
> 3. The Norris-LaGuardia Act establishes no bar against such judicial enforcement where a strike is threatened in violation of the general provisions of the Railway Labor Act requiring the parties "to exert every reasonable effort to make and maintain agreements."

Thus, as recently as a few weeks ago, this Court has made manifestly clear that a perfunctory exhaustion of statutory and contractual processes will not suffice. This being so, how much more clear it is that a *complete failure*, such as ALPA's, to exhaust those procedures justifies, and in fact demands, full utilization of the injunctive powers of the federal courts. The Eighth Circuit Court of Appeals focused precisely on this point in granting injunctive relief pending processing the dispute through the mandatory procedures. Yet, ALPA now suggests that the Eighth Circuit's decision

is "inconsistent" with the principles laid down by this Court.

In support of this proposition, ALPA refers to three cases. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969); *Atlantic Coast Line R.R. v. Brotherhood of R.R. Trainmen*, 385 U.S. 20 (1966); *Brotherhood of Ry. Clerks v. Florida East Coast Ry.*, 384 U.S. 238 (1966). In each of those cases, this Court held only that once all of the mandatory procedures for the resolution of "major disputes" have been exhausted, then self-help may be invoked by both parties to the dispute in their quest for a more advantageous contract. Nothing in these cases even remotely suggests that such self-help is available to a party who, like ALPA, has exhausted none of the mandatory processes. In fact, this Court in these cases has continued to support the principle that the crux of the Railway Labor Act is the duty "to exert every reasonable effort to make and maintain agreements" while passing through a deliberately long, drawn-out statutory procedure before resorting to self-help.

In the instant case, BRAC, having exhausted all of the statutory procedures in connection with its "major dispute" with NWA, had become free to strike in accordance with the principle of these decisions, and it did so. However, ALPA now contends that not only does this principle authorize *BRAC* to strike against NWA, but also "implicit" in that principle is the "corollary right of non-striking employees to honor those picket lines," thus effectively joining the BRAC strike. We submit that not only is there no implicit authority in the decisions of this Court for such irresponsible conduct, but in fact there is explicit authority directly prohibiting such conduct, as outlined earlier in this Part I. Indeed, had the Eighth Circuit not granted injunctive relief against ALPA's proposed strike, then its decision would have been

completely inconsistent with the principles established by this Court's prior decisions.

II. THE COURT OF APPEALS' DECISION IN NO WAY CONFLICTS WITH THAT OF THE FIFTH CIRCUIT COURT OF APPEALS IN BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN V. FLORIDA EAST COAST RY., 346 F.2d 673 (5th CIR. 1965).

Examination of the Fifth Circuit's decision in *Brotherhood of Locomotive Firemen and Enginemen v. Florida East Coast Ry.*, 346 F.2d 673 (5th Cir. 1965), reveals no conflict whatsoever with the Eighth Circuit's decision in the instant case. In the Fifth Circuit case, the plaintiff carrier, unlike NWA in the instant case, sought to enjoin sympathetic refusals to perform services by employees of *another carrier* on the ground that such other employees were engaged in a "minor dispute" with their own employer which *affected* the plaintiff. The Court denied the injunctive relief expressly on the ground that one employer is not entitled to injunctive relief in connection with a "minor dispute" between another employer and its employees. The Court declined to make any holding with respect to the right to injunctive relief if the striking employees' own employer had sought such relief. Thus, the purported "conflict" is illusory.

Furthermore, three recent decisions of the Fifth Circuit Court of Appeals establish that that Circuit is perfectly in accord with the principles articulated by this Court and the decision of the Eighth Circuit in the instant case. In *Ruby v. Taca Int'l Airlines*, 439 F.2d 1359 (5th Cir. 1971), ALPA [the same petitioner as in the instant case] sought to obtain injunctive relief, claiming that it had a major dispute with the carrier which had not yet been processed through the statutory procedures for the handling of such a dispute. The

Fifth Circuit agreed, citing the prior decisions of this Court, and it granted ALPA the requested injunctive relief.[7]

In *Atlanta & West Point R.R. v. United Transp. Union*, 439 F.2d 73 (5th Cir. 1971), the court discussed at length the underlying policy of the Railway Labor Act, as well as this Court's prior decisions in the *Jacksonville Terminal, Detroit & Toledo Shoreline* and *Chicago River* cases, among others, in finding that injunctive relief should issue.[8] And in *Railway Express Agency, Inc. v. Brotherhood of Ry., Airline & S. S. Clerks*, 437 F.2d 388 (5th Cir. 1971), the court held, in the context of a minor dispute, that injunctive relief was appropriate pending resolution thereof through the statutory and contractual processes.

Again then, had the Eighth Circuit held otherwise in the instant case, it would have subjected itself to a legitimate charge of "conflict" with the recent rulings of the Fifth Circuit Court of Appeals.[9]

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[7]The Fifth Circuit also disposed of the carrier's contention that the entire proceeding was rendered moot by the parties' invocation of the statutory procedures. ALPA argued, and the court held, that the carrier had neither expressly nor implicitly abandoned its original objections to the District Court's entry of injunctive relief, and therefore the matter certainly was not moot. In the instant case, ALPA contended before the Eighth Circuit on rehearing that the entire controversy between NWA and ALPA is moot because the BRAC strike is over. However, ALPA refused to concede that it had no right to instruct its members to refuse to cross the BRAC picket lines. The Eighth Circuit appropriately held, as had the Fifth Circuit in the *Ruby* case, that the matter definitely was not moot.

[8]Significantly, the Fifth Circuit also found that its exercise of jurisdiction in granting injunctive relief did not hinge upon classification of the dispute either as "major" or "minor", since in either event injunctive relief may be appropriate. *Atlanta & West Point R.R. v. United Transp. Union*, 439 F.2d at 78.

[9]Petitioner also alludes to the District Court decision in *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 190 F. Supp. 495 (W.D. Wash. 1961). However, the authoritative value of that case is diminished to virtually nothing by virtue of the Eighth Circuit's decision in *International Ass'n of Machinists v. Northwest Airlines, Inc.*, 304 F.2d 206 (8th Cir. 1962). See p. 20, n. 11, *infra*.

III. THE COURT OF APPEALS' DECISION IS NOT ONLY CONSISTENT WITH THE STATUTORY COLLECTIVE BARGAINING STRUCTURE, BUT IN FACT IS REQUIRED TO PROTECT THE INTEGRITY OF THE STATUTORY AND CONTRACTUAL PROVISIONS FOR THE RESOLUTION OF DISPUTES SUCH AS THAT IN THIS CASE.

We contend that the Eighth Circuit appropriately granted the requested injunctive relief in the instant case since the dispute at issue is a "minor dispute," and therefore NWA is entitled to injunctive relief to protect the integrity of the statutory and contractual procedures required for the resolution of such a dispute. In the alternative, even if the dispute at issue in the instant case is deemed neither a "major dispute" nor a "minor dispute," plaintiff is entitled to injunctive relief to protect the integrity of and effectuate the policies of the Railway Labor Act.

A. The Dispute at Issue in the Instant Case Is a "Minor Dispute," and Therefore NWA Is Entitled to Injunctive Relief to Protect the Integrity of the Statutory and Contractual Procedures Required for the Resolution of Such a Dispute.

As noted in the Statement of Case, Section 32 of the AGREEMENT between NWA and ALPA and the separate System Board Agreement provide a detailed machinery, as required by 45 U.S.C. § 152 First, Second and Sixth and § 184, for the resolution of disputes involving interpretation or application of the AGREEMENT. To be sure, the AGREEMENT does not contain an *express* no-strike clause. However, this Court specifically has held that where a detailed machinery for resolution of disputes is provided, the collective bargaining agreement between the parties is deemed to contain an *implied* no-strike clause whereby the union agrees not to strike unless and until the grievance and

arbitration procedures have been exhausted. *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95 (1962); *accord, New York Mailers' Union No. 6, I.T.U. v. NLRB*, 327 F.2d 292 (2d Cir. 1964). In the *Lucas Flour* case, Mr. Justice Stewart wrote as follows:

> Whether, as a matter of federal law, the strike which the union called was a violation of the collective bargaining contract is thus the ultimate issue which this case presents. It is argued that there could be no violation in the absence of a no-strike clause in the contract explicitly covering the subject of the dispute over which the strike was called. We disagree.
>
> The collective bargaining contract expressly imposed upon both parties the duty of submitting the dispute in question to final and binding arbitration. In a consistent course of decisions the Courts of Appeals of at least five Federal Circuits have held that a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement. The National Labor Relations Board has reached the same conclusion. *W. L. Mead, Inc.*, 113 N.L.R.B. 1040. We approve that doctrine. To hold otherwise would obviously do violence to accepted principles of traditional contract law. Even more in point, a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare. See *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

Id. at 104-06.

Prior to the *Lucas Flour* decision, various commentators already had recognized the inherent logic of this argument. Thus, in Teller, *Labor Disputes and Collective Bargaining*, § 277 (1947 Supp.), the following language appears:

> Whether a collective bargaining agreement does or does not contain a no-strike clause, a strike, called during

> the term of the agreement, would be a breach of the agreement. The no-strike clause is simply inserted so that all employees may be apprised clearly of their obligation, but it is not legally necessary. This seems clear from the fact that continuity of production is one of the main reasons for the execution of a collective bargaining agreement for a specific term.

Archibald Cox, an outstanding expert in the field of labor law, echoes similar sentiments in Cox, *Some Aspects of the LMRA, 1947*, 61 Harv. L. Rev. 274, 308-309 (1948):

> Under an agreement fixing wages, hours and terms and conditions of employment for a definite period, both parties impliedly promise not to take action to compel their change before the agreement expires. If a grievance procedure is established, as is almost always the case [here it is established not only by the AGREEMENT, but by the RLA itself], one may also fairly imply an additional understanding by each party not to use economic pressure to settle a question of interpretation until the procedure has been exhausted. Either implied covenant would be sufficient consideration to make the agreement a binding contract; and, in the absence of an exculpatory clause, there should be liability for a breach of either covenant.

Thus, since the AGREEMENT between NWA and ALPA contains an express grievance and arbitration procedure, it also must be deemed to contain an implied no-strike provision. Whether that provision precludes ALPA from a sympathetic strike in the form of refusing to cross the BRAC picket lines clearly is a dispute arising out of the "interpretation or application" of the AGREEMENT [45 U.S.C. § 151a (5)] and as such is a "minor dispute."

This becomes all the more apparent when one considers Section 23 of the AGREEMENT pertaining to loss of seniority for refusal to report for work upon NWA's orders to do so. If NWA were to discharge each pilot who, in response to ALPA's orders, disobeyed those of NWA and refused to

cross the BRAC picket lines or fly, certainly ALPA would never concede that it could not file grievances on such discharges and request a System Board's decision on NWA's application of Section 23 to such a refusal to work without processing the discharges through the investigation and discipline procedures outlined in Section 31 of the AGREEMENT. This being true, ALPA then must also concede that it has no right to deny NWA's right to grieve over ALPA's orders to its members not to cross picket lines in lieu of the more severe act of discharging them, which obviously would not aid in either maintaining the AGREEMENT or avoiding interruptions in interstate air commerce.

In such circumstances, there is a clear "minor dispute" over the interpretation of Section 23 and its application to the instant set of facts. NWA claims the contract permits the termination of pilots who take ALPA orders in preference to those of the employer. ALPA obviously argues that the contract means no such thing. The contractual and statutory route for settling such disputes is compulsory arbitration, which will be a wholly fruitless and futile waste if ALPA can engage in a strike which shuts down NWA until ALPA's unilateral ruling is overruled by the System Board.[10] Furthermore, NWA's remedy of discharging each pilot who

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[10]The threshold question of whether this dispute is arbitrable under the grievance and arbitration procedure of the AGREEMENT is for consideration by the court, but only according to a very strictly limited standard. Thus, this Court in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 564, 582-83 (1960), held:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

Citing this precise language, the Eighth Circuit held that the AGREEMENT between NWA and ALPA is "susceptible of an interpretation" covering the dispute over refusal to cross BRAC picket lines, and thus ordered the parties to the System Board of Adjustment.

complies with ALPA's orders and refuses to cross the BRAC picket lines is totally meaningless, since its passengers still would not be transported pending the processing of the grievances created thereby. Therefore, since ALPA did not invoke the procedure outlined in Section 32 of the AGREEMENT and in the System Board Agreement for resolution of this "minor dispute," NWA did so. Consequently, NWA was entitled to injunctive relief to permit this interpretation dispute to be resolved through the orderly contractual processes. *International Ass'n of Machinists v. Northwest Airlines, Inc.*, 304 F.2d 206 (8th Cir. 1962).[11]

The question of whether the ALPA action in ordering the pilots to fly violates the AGREEMENT obviously involves an interpretation of the AGREEMENT. NWA maintains, in good faith, that the pilots may not be ordered by ALPA

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[11] This Boiler Operators Case arose out of the same set of facts present in *Northwest Airlines, Inc., v. Transport Workers Union of America AFL-CIO*, 190 F. Supp. 495 (W.D. Wash. 1961), relied upon by ALPA for the proposition that the dispute in the instant case is not a "minor dispute." In the *Transport Workers Union* case, the Court held no "minor dispute" was presented by a refusal to cross picket lines. However, we submit that that decision is not of controlling significance in view of the exactly opposite ruling of the Eighth Circuit Court of Appeals in the Boiler Operators Case that a refusal to cross picket lines in violation of a no-strike obligation does create a "minor dispute" which must be processed in accordance with the provisions of the Railway Labor Act. Also, in another case arising out of the BRAC strike, *Northwest Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers, et al.*, 323 F. Supp. 107 (D. Minn. 1970), the court ruled that a refusal to cross picket lines in defiance of NWA's orders presents a "minor dispute"; and the Eighth Circuit Court of Appeals, in its Order of November 25, 1970, directed as follows:

> [T]his Court and all parties to the action agree that the single underlying issue is whether IAM, in the light of the no-strike provisions of the bargaining agreement, retains the right to instruct its members to honor the picket lines of a sister Union.
>
> We order that this basic issue and others collateral to it be submitted by the parties to the Systems Adjustment Board without delay.

In any event, even if the present dispute is not deemed to fall precisely within the definition of a "minor dispute," Section B. of this Part III. clearly demonstrates that injunctive relief is not only appropriate, but absolutely essential.

to refuse to fly when the company has flying for them to do. ALPA asserts that the contrary is true—that ALPA can, under the contract, countermand or abort NWA's order. NWA submitted this controversy to the System Board for final and binding determination; and until it is decided that pilots have no contractual obligation to fly as ordered, the union properly is enjoined from making a unilateral change in the rules and working conditions. ALPA cannot, under the statute and the contract, be the judge of the legality of its own conduct.

B. Even If the Dispute at Issue in the Instant Case Is Deemed Neither a "Major Dispute" Nor a "Minor Dispute," NWA Is Entitled to Injunctive Relief to Protect the Integrity of and Effectuate the Policies of the Railway Labor Act.

ALPA contends that it has no "major dispute" with NWA, since it is not seeking to obtain new or modified rates of pay, rules or working conditions. It further contends that it has no "minor dispute" involving the interpretation or application of any provision of the AGREEMENT. Thus, its argument continues, its right to engage in a sympathetic refusal to cross the BRAC picket lines creates a dispute, if any, which falls into some kind of a twilight zone not cognizable under the Railway Labor Act either as a "major dispute" or as a "minor dispute," thus leaving it free to engage in whatever activity it deems appropriate.

The fallacy of this contention becomes all the more obvious when one considers the expressed purpose of the Railway Labor Act to channel all disputes between carriers and their employees or representatives into the categories of "major disputes" [which the parties are mandated to *attempt* to resolve through a *mediatory* process] or "minor disputes" [which *actually* are to be resolved through a man-

datory *adjudicatory* process]. As outlined so clearly by the Railway Labor Act, the underlying purpose of the Act is to prevent interruptions of commerce, thereby effectuating the national transportation policy articulated in the Transportation Act of 1940, 54 Stat. 899, amending the Interstate Commerce Act, 49 U.S.C. § 1, *et seq.*:

> It is hereby declared to be the national transportation policy of the Congress to . . . promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers.[12]

In the face of the underlying policy of the Railway Labor Act and the Transportation Act of 1940, ALPA still contends (1) that in the absence of an express no-strike provision in the AGREEMENT there can be no question of interpretation thereof raised by its refusal to cross the BRAC picket lines, and (2) therefore, there being no "minor dispute," a status quo injunction may not be issued. However, quite apart from any express contractual obligation not to strike [and the handling of "minor disputes" over interpretation thereof], the *Railway Labor Act* imposes a *statutory* obligation upon employers and employees to avoid interruptions in operations except in one instance only: where the parties have been unable to resolve a "major dispute" over changes in an agreement after the "Section 6" mandatory procedures of the Act have been exhausted, at which time both parties then, *and only then*, are free to exercise self-

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[12] The federal courts repeatedly have recognized the paramount need to effectuate this national policy and not to permit it to be subverted by labor disputes. See, e.g., *Montgomery Ward Co. v. Northern Pac. Terminal Co.*, 128 F. Supp. 475 (D. Ore. 1953); *Erie R. Co. v. Local 1286 Int'l Longshoremen's Ass'n*, 117 F. Supp. 157 (W.D. N.Y. 1953); *Merchandise Warehouse Co. v. A. B. C. Freight Forwarding Corp.*, 165 F. Supp. 67 (S.D. Ind. 1958); *Quaker City Motor Parts Co. v. Inter-State Motor Freight System*, 148 F. Supp. 226 (E.D. Pa. 1957).

help. This statutory obligation, manifested throughout the Act, is imposed most particularly by Section 2 First [45 U.S.C. 152 First], which, as discussed at pp. 11-12, *supra*, does impose an affirmative, judicially enforceable, legal obligation by the terms of this Court's ruling in the *Chicago & Northwestern* case.

ALPA and NWA have a currently effective and valid collective bargaining agreement which, by the terms of the foregoing provision of the Railway Labor Act, they are required to "maintain" by exerting "every reasonable effort." This mandatory, statutory judicially enforceable obligation depends in no way on the existence of an express no-strike provision in the AGREEMENT; nevertheless, ALPA contends that it is free to refuse to "maintain" the agreement without making *any* effort, let alone "every reasonable effort." Such a refusal to comply with the express provisions of the Railway Labor Act is enjoinable, and the federal courts, even prior to *Chicago & Northwestern*, have so held.

In *Chicago & Illinois Midland R.R. v. Brotherhood of R.R. Trainmen*, 315 F.2d 771 (7th Cir. 1963), *cert. denied and judgment vacated as moot*, 375 U.S. 18 (1963), the court enjoined the refusal of a carrier's employees to cross a picket line established at the plaintiff's plant on the ground that such refusal was a violation of the Railway Labor Act because the union had made no "attempt to comply with the Railway Labor Act provisions." *Id.* at 775. In response to the union's argument that the plaintiff carrier had failed to comply with the provisions of Section 2 First and Second of the Act, the court noted that it was the *union* which had disturbed the status quo without any attempt to comply with those same provisions. The court spent no time determining whether the dispute could be termed "major" or "minor", but rather enjoined the union's conduct due to its failure to

comply with, and effectuate the policies of, the Railway Labor Act.

In *Pan American World Airways v. International Brotherhood of Teamsters*, 275 F. Supp. 986 (S.D.N.Y. 1967), *aff'd on opinion below*, 401 F.2d 938 (2d Cir. 1969), the court held that a strike by one of two competing unions to compel a company to bargain with it during the pendency of a representation petition before the National Mediation Board could be enjoined, even though the dispute between the carrier and the unions was deemed to be neither "major" nor "minor" in the customary sense. The same was true in *Long Island R.R. v. System Federation No. 156*, 368 F.2d 50 (2d Cir. 1966), in which the court enjoined a slow-down and work stoppage which immobilized and delayed the plaintiff's trains, even though the action was the result of an internal union power struggle and involved a dispute which was neither "major" nor "minor" in the customary sense. Quoting Section 2 First of the Railway Labor Act, the court held that the union conduct was a "flagrant violation of the Act." [13]

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[13] Two other cases involving the Long Island Railroad also raised the same issue. In *Long Island R.R. v. Brotherhood of Locomotive Engineers*, 290 F. Supp. 100 (E.D. N.Y. 1968), the union protested regulations put into effect by the owner of Penn Station [not the employer in question] and threatened to strike unless the regulations were rescinded. The court enjoined the strike as unlawful without categorizing it as one over either a "major" or "minor" dispute. In *Long Island R.R. v. System Federation No. 156*, 289 F. Supp. 119 (E.D. N.Y. 1968), the court issued an injunction against work slowdowns resulting from the "concern by union members about possible reductions in work force by new officials of the railroad." In doing so the court said:

> Due to the indefiniteness of the union's grievances, it is not clear whether the differences between the parties may best be settled by the National Mediation Board, the National Railroad Adjustment Board, or a special adjustment board as provided by 45 U.S.C.A. Section 153 Second. It need not be decided which board is appropriate or whether this dispute is major or minor in nature.

Id. at 126.

Again, then, whether or not the current dispute between NWA and ALPA may be classified as a "minor dispute" over the interpretation of the AGREEMENT really is immaterial. What is material is that the Railway Labor Act itself imposes important and serious obligations on both parties, with which ALPA has made no attempt to comply, in order to effectuate the purposes of the Railway Labor Act and the Transportation Act of 1940. To allow ALPA to ignore these obligations and make a unilateral determination to refuse to cross BRAC picket lines, simply on the ground that the existing collective bargaining agreement contains no express no-strike clause, would be to hold that the union is free to strike during the term of an effective agreement over *anything* that it claims does not fall strictly within the customary definitions of a "major dispute" or "minor dispute." For example, ALPA would be free to strike in protest against actions of other employers, and in protest against, or in support of, actions of other unions. In fact, it would leave ALPA free to strike for *any* reason, or even for *no discernible reason*, provided only that no strike be called over a dispute referable to the System Board of Adjustment or during the pendency of the processes of the Act in connection with a "major dispute." Certainly, such emasculation and destruction of the Railway Labor Act cannot be permitted, and has not been permitted by any court. Whether a dispute be considered "major" or "minor," or some other kind of "dispute," NWA is entitled to the requested injunctive relief.[14]

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[14] If the dispute be deemed some other kind of dispute which is neither "major" nor "minor," 45 U.S.C. § 183 (b) permits the parties to refer the matter to the National Mediation Board. Therefore, in an effort to do everything possible to invoke the appropriate administrative procedures, NWA forwarded a telegram to the National Mediation Board requesting its advice as to the availability of its services under the foregoing provision, and requesting such services, if available.

CONCLUSION

The decision of the Eighth Circuit Court of Appeals in this case is not only consistent with principles established in decisions of this Court, but in fact is required by those decisions. Furthermore, the Eighth Circuit's decision in no way conflicts with that of the Fifth Circuit in *Brotherhood of Locomotive Firemen and Enginemen v. Florida East Coast Ry.*, 346 F.2d 673 (5th Cir. 1965). Finally, the Eighth Circuit's decision is not only consistent with the statutory collective bargaining structure, but in fact is required to protect the integrity of the statutory and contractual provisions for the resolution of disputes such as that in this case. Therefore, we submit that this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

HENRY HALLADAY
2400 First National Bank Bldg.
Minneapolis, Minnesota 55402
Attorney for Respondent

DORSEY, MARQUART, WINDHORST,
WEST & HALLADAY
DAVID A. RANHEIM
2400 First National Bank Bldg.
Minneapolis, Minnesota 55402
Of Counsel